WAIVER AND ESTOPPEL IN INSURANCE LAW.—The confusion in cases treating of the liability of the insurer on the breach of a condition by the insured, is largely attributable to the failure to discriminate accurately between the terms "waiver" and "estoppel" and to give each its proper application. The terms have often been used synonymously.[1] In fact, however, they are antithetical. A waiver is a voluntary relinquishment of a known legal right dependent upon intention.[2] An estoppel, on the other hand, forbids a party from showing his true state of mind.[3] By the weight of authority, a waiver to bind the insurer needs no consideration nor action in reliance on it by the insured.[4] It seems undisputed that an express waiver is valid without either consideration or reliance thereon, yet many cases incongruously hold that a waiver may not be implied in the absence of the elements of estoppel,[5] and a recent text-writer asserts that no other rule is justifiable on principle.[6] Such a view loses sight of the fact that intention may be displayed by conduct as well as by words.[7] Where the evidence of conduct is sufficient, the additional demand of the elements of estoppel is unnecessary to protect the insured. Moreover the requirement of such elements would place insurance contracts in a class by themselves. Although some English decisions, in refusing to enforce conditions in charter parties after substantial performance, seemed to proceed upon the ground that it would be unjust to allow a party who had accepted part performance to later take advantage of the breach, and thus escape all liability,[8] it is there now settled, and has always been the rule in this country with regard to contracts other than those of insurance, that intention is the sole test.[9] If a party takes a position inconsistent with an insistence upon the breach of the condition, there is a fair inference of fact that he has relinquished his right to avoid the contract. This principle has been applied in cases of distress by the lessor after breach of condition,[10] acceptance of partial delivery under an entire contract,[11] unconditional delivery under a contract for a cash sale.[12] A waiver, however, cannot be legitimately implied unless there is some evidence of intention. In disregard of this principle, some courts, as in a recent case, *Farmers' Alliance Ins. Co.* v. *Ferguson* (Kan. 1908) 98 Pac. 231, have held that a denial of liability by the insurer on the ground of a breach of one condition only, constitutes a waiver of the right to avoid for the breach of other conditions which were known by the insurer when he gave notice of his refusal to pay.[13] In these cases there is no intent to waive. Nor is a justification of these decisions possible on the ground of estoppel, on which it is also placed, unless a duty to speak is arbitrarily

[1]Vance, Ins. 343; Ins. Co. *v.* Wolff (1877) 95 U. S. 326; Viele *v.* Germania Ins. Co. (1868) 26 Ia. 9.
[2]United Firemens Ins. Co. *v.* Thomas (1897) 32 Fed. 406; Fishbach *v.* Van Dusen & Co. (1885) 33 Minn. 111; Ward *v.* Life Ins. Co. (1895) 66 Conn. 227, 240.
[3]Bigelow, Estoppel 476.
[4]House Fire Ins. Co. *v.* Kuhlmann (1899) 158 Neb. 488; Astrich *v.* German Am. Ins. Co. (1904) 131 Fed. 13, 20.
[5]Armstrong *v.* Ins. Co. (1892) 130 N. Y. 560; Gibson Elec. Co. *v.* Globe Ins. Co. (1899) 159 N. Y. 418.
[6]Vance, Ins. 372.
[7]Farlow *v.* Ellis (1860) 15 Gray 229.
[8]Pust *v.* Dowie (1863) 32 L. J. Q. B. 179.
[9]Fishback *v.* Van Dusen & Co., *supra.*
[10]Ward *v.* Day (1863) 4 Best & Sm. 335.
[11]Brady *v.* Cassidy (1895) 145 N. Y. 171.
[12]Fishbach *v.* Van Dusen & Co., *supra.*
[13]Pa. Fire Ins. Co. *v.* Hughes (1900) 108 Fed. 117; Ga. Home Ins. Co. *v.* Allen (1900) 128 Ala. 457.

imposed on the insurer.[14] It is to be noted, however, that the same rule has sometimes been applied in cases of sales; and New York inconsistently accepts it in the latter branch of law[15] but refuses to follow it in insurance law.[16]

Where an insurance company at the time of the delivery of the policy has knowledge of a breach of a condition, the performance of which by the terms of the policy is a condition precedent to the assumption of any risk, the great weight of authority allows a recovery on the theory of estoppel.[17] Manifestly no estoppel can be based on any reliance on a representation prior to the formation of the contract: such a representation would be as to a future fact. The representation recognized by the courts is one implied from the issuance of the policy, that the contract at that time is binding.[17] It is difficult to see, however, how the insured is entitled to rely on a contemporaneous representation at variance with the terms of a written contract which gives him notice of the effect of the breach of his warranty.[18] This theory of estoppel was evolved from the desire to protect prospective policy holders from the pitfalls of a contract intelligible only to experts;[19] its adoption may, perhaps, be partly attributed to the courts' difficulty in finding a waiver. Since all the negotiations prior to the written contract are merged therein, and the written instrument represents the entire agreement of the parties, it follows by virtue of the parol evidence rule that no statement prior to or contemporaneous with the issuance of the policy can be introduced to modify its terms.[20] For this reason there can be no prior or so-called contemporaneous waiver. There may, however, be a subsequent waiver which will sufficiently protect the insured. On breach of condition the policy is voidable, not void. From its issuance there exists a right to avoid for breach of this condition precedent which may be relinquished either expressly or by implication. If the insurer, having knowledge, either actual or imputed, of facts constituting a breach, later accepts payment of a premium or does any other act in recognition of the validity of the contract, a waiver may properly be implied. The introduction of evidence to show knowledge of the fact by the insurers prior to the issuance of the policy in no way varies the terms of the policy, and clearly does not violate the parol evidence rule. In other contracts there is no objection to a subsequent waiver of a condition broken at the formation of the contract.[21]

THE REQUIREMENT OF PRIVITY IN INTERPLEADER.—It is sometimes said "that the doctrine of interpleader is essentially founded on privity between the parties."[1] This is inaccurate. Where the plaintiff stands in the same

[14]Welsh *v.* London Ass. Co. (1892) 151 Pa. 607: Hubbard *v.* Mut. etc. Life Ass'n. (1897) 80 Fed. 681.
[15]Littlejohn *v.* Shaw (1899) 159 N. Y. 188.
[16]Devens *v.* Ins. Co. (1888) 83 N. Y. 168.
[17]Van Schoick *v.* Fire Ins. Co. (1877) 68 N. Y. 434; Spalding *v.* Fire Ins. Co. (1902) 71 N. H. 441; Vance, Ins. 362; *contra*, Dewees *v.* Ins. Co. (1872) 35 N. J. L. 366.
[18]Cf. Northern Ass. Co. *v.* Building Co. (1902) 183 U. S. 308.
[19]Ins. Co. *v.* Wilkinson (1871) 13 Wall 222.
[20]Union etc. Ins. Co. *v.* Mowry (1877) 96 U. S. 544.
[21]Polhemus *v.* Herman (1893) 45 Cal. 573; cf. Behn *v.* Burness (1863) 3 Best & Sm. 749.

[1]23 Cyc. 11; see also Pom. Eq. Jur. (3rd Ed.) § 1324.